No. 15,082

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation, *Appellant,*

vs.

RICHARDSON VISTA CORPORATION and PANORAMIC VIEW CORPORATION, *Appellees.*

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF OF ALASKA, THIRD DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

BRIEF OF APPELLEE

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Panoramic View Corporation.

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United States Court of Appeals
For the Ninth Circuit

City of Anchorage, a Corporation, *Appellant,* vs. Richardson Vista Corporation and Panoramic View Corporation, *Appellees.*	No. 15082

Appeal from the District Court for the District of of Alaska, Third Division
Honorable George W. Folta, *Judge*

BRIEF OF APPELLEE

FOREWORD

Appellee, Panoramic View Corporation, takes issue with Appellant City's statement of what it designates as the "facts" upon which this case has been brought here for review. It is our concept that the function of a statement of facts is to fairly and briefly set forth accurately the skeletal factual situation shown by the record upon which the trial court based its judgment.

In the trial of the case and just before the close of appellee's case, there was introduced into evidence an ordinance of The City of Anchorage, which had repealed an Ordinance upon which appellant's counsel was relying (Ex. 10, R. 356). Counsel expressed surprise and asked for a recess to check the city's records.

The recess was granted and when court re-convened, counsel for appellant City stated, in part as follows (R. 356-362):

"Mr. Rader: . . . There is no doubt that it (Ord. No. 55, Ex. i) was impliedly repealed by the Code. The question is whether it actually was repealed, *but then that question is no longer, I guess, necessary because of the fact that plaintiffs have produced actually the repealing Ordinance of 1949 which predates the code.* (Emphasis supplied)

The Court: But it seems to me it would be impliedly repealed by the enactment of the code.

Mr. Rader: It could have been and it may have been. I don't know, but apparently the previous City attorneys and the utility company in operation have not considered it as being repealed.

The Court: You mean operating under it?

Mr. Rader: They have been operating — some parts of the ordinance have been repealed and changed. Some of the procedure has been changed by subsequently enacted ordinances and matters which are contained in the agreed code and the amendment to the agreed code by the council to date since 1950, but the important (319) sections of Section 55 are those which were repealed and nothing was replaced. In other words, it was apparently repealed in 1949 during the time Mr. Hellenthal was City attorney and nothing was enacted to replace it. *I suppose that it puts the utility company in a situation as having operated completely without any ordinance as to the matters in essential dispute in this action.* However, I am not certain that what I am saying has too much bearing on the question because I am prepared still to argue my mo-

tion to dismiss on the evidence presented thus far as to discrimination. (Emphasis supplied)

THE COURT: I don't know yet—nobody has apprised me what it is that Ordinance 55 provides for.

MR. RADER: Ordinance 55, if it please the court, Section 22, *'Supply to separate premises through separate meters. In no event will separate premises, even though owned by the same consumer, be supplied with electricity through the same meter or meters.'* That is Section 22. Section 24, *'Readings of separate meters not combined. For the purpose of making charges all meters upon the consumer's premises shall be considered separately and the readings thereof shall not be combined,* except that where the City shall, for operating convenience, install upon the consumer's premises, in place of one meter, two or more meters, then the readings of such two or more meters shall be combined for the purpose of making charges.' (Emphasis supplied) But, frankly, I don't know what the effect of operating without any ordinance whatsoever amounts to in the legal significance of this thing, but I don't think it can (320) have too much effect under the law of the case because of the fact that there is no showing—the plaintiffs have only mentioned one instance where they thought that anybody was being treated any differently than themselves and that was the case of International Airport. I am prepared to go into some of the cases on it if your Honor wants to listen to it.

THE COURT: Well, you said you wanted to argue a motion so if you want to argue, go ahead.

(Whereupon, arguments on motion to dismiss were made by Mr. Rader, Mr. Reischling, Mr. Cottis and Mr. Rader.)

> THE COURT: If that is all to be said in connection with the motion, the court will deny the motion. You may proceed with the defendant's case." (R. 360, 361, 362)

Notwithstanding his admission in open court that the ordinance on which he intended to rely had been repealed, counsel for appellant has opened his case before this court by setting out verbatim, Sec. 22 and 24 of *Repealed Ordinance 55* (Repealed 8/24/49, Ex. 10). Appellant states: "In 1925, the City passed Ordinance 55, *which ordinance governed the conduct and operation of the electrical system of the city*" (Emphasis supplied). Appellant then sets out the two sections above noted. He then points out that only the municipality has by law any regulatory powers over Public Utilities in the Territory of Alaska and then states: "The City of Anchorage, in the operation of its utility, apparently, *at all times from the date of 1925 up to and including the time of trial of this action had established a policy against conjunctive billing*" or, more properly stated, the City of Anchorage had no ordinance, regulation or tariff permitting conjunctive billing . . . " (Emphasis supplied).

Approximately 2000 words covering some 8 pages of additional matter, are then written and a short 2 line statement is then made that Ordinance 55 was repealed in 1949 by Ordinance 283 (See R. 10).

We do not believe that logic will permit the conclusion that a "policy" can be shown to continue to exist when it has been shown that the Ordinance upon which the policy (if any) was based has been repealed and no similar ordinance was enacted to replace it. Neither do

we believe that a City can arbitrarily refuse to grant to a resident, otherwise qualified, the full measure of the services it has undertaken to furnish under a published rate schedule, presumptively setting forth all of the regulations and charges governing the furnishing of such services.

We submit that appellant, perhaps inadvertently, misled the court in quoting restrictive provisions of a repealed ordinance to evidence the asserted continuation of the policy prescribed by the ordinance, but which was repealed, at about the very time that he contends the "established" policy as contained in the repealed ordinance becomes helpful to his case, without clearly pointing out that the ordinance had been repealed just prior to the occurrences from which arose the present litigation. Accordingly, being unable to accept appellant's "Statement of Facts" we must, to adequately present the legal questions, restate the facts shown by the record.

RESTATEMENT OF THE CASE

Appellee Panoramic View Corporation is the owner-operator of a garden court type apartment project, consisting of 264 apartment units contained in 14 two-story buildings erected upon approximately 17 acres of land leased from the Department of the Interior of the United States of America and located within or adjacent to the City of Anchorage, Alaska. Exhibit "H" shows the distribution of the buildings on the ground—buildings numbered 20 through 33 being those of appellee, Panoramic View Corporation. The buildings constructed (1949-1951) were designed and built in ac-

cordance with Federal Housing Administration Rules, Regulations, and Requirements. The spacing of the buildings on the ground was in accordance with FHA directives and the buildings were separated in order to provide light, air, and lawns around the apartment units. Tenant rentals are fixed by the Federal Housing Administration. The maximum number of units in any one building is 22 and the minimum 12. Each individual apartment is separately wired and separately metered, the meters for the units being located in the basement of each building. Exhibits 6, 7 and 8 are photographs of typical switchboards—meter boards—of the 22, 16 and 12-units buildings. It should be stated here that Richardson Vista, co-plaintiff in this action, owns and operates 19 buildings of 22 units each. Panoramic View, however, has 8 buildings of 22 units, 4 buildings of 16 units and 2 buildings of 12 units each. The electric power to each building is controlled by the master switch at the top center of each meter board and the meters shown thereon are the meters of the individual apartment units which measure the electricity consumed by each of the individual tenants in each building.

The house meter is shown on the lower left hand corner of the photograph of the 22-meter board and the 12-unit meter board and is the second meter from the right on the 16-unit meter board.

The house meters above referred to measure the current used by appellee corporation in each of the buildings for the common hallways, basements, entrance area ways and the small motors which pump the hot water through the radiators in the tenant's quarters from a

conversion room located in each basement where water, heated by steam, from the separate heating plant constitutes the building heating system.

(It should be clearly understood at the outset that the plaintiff's contention here *is not the total of the electricity metered to the individual tenants be combined and the rate figured on the basis of the total electrical energy consumed by said individual tenants but only that the power used by appellee corporation and measured by the house meter be combined and the declining rate applied thereto in accordance with the published rate schedule and the prior agreement of the City that it would so do* and as is provided for, and in accordance with the published *rate schedule for establishments using the same kind of electrical energy for but one purpose. No contention is made here that one establishment is entitled to use power in several dis-associated ways and compel the utility to combine the total of the power variously used and give to the user the benefit of a rate* which might be the lowest of the varying rates offered *for the different classifications of* power used. Here we have one common use by one owner, upon one leasehold, and would be the same if all of the 264 units were contained within one structure wherein there would be but one meter for all of the hallway lights, areaway entrances and incidental electrical power used in the operation of the building for the convenience of the tenants) (Emphasis supplied).

The height limitation of two stories, making it impossible to build a multi-storied building, was prescribed by the military authorities at Fort Richardson

because of the proximity of the apartment buildings to the runways on Elmendorf Air Force Base which, at the time of the construction, was a part of the Fort Richardson Military Reservation (R. 164, 187, 188).

Prior to the development of the projects owned by the appellees herein on Government Hill, that area was largely an unsettled wasteland in close proximity to Fort Richardson. There were but a few quonset huts in the entire area and there was no lighting system, sewerage system or water system, other than the water system furnished by the Alaska Railroad to the few persons who leased lots and had trailers or quonset huts located thereon. Accordingly, it was necessary for the builder to supply a sewer system, water system, sidewalks, street lighting, power for construction—in other words, all utilities ordinarily furnished by a municipality. The City had no funds or facilities for this purpose and just before ground breaking (1949) had been able to give no assurance it would be able to furnish electricity or other utilities to service the prospective project. Many conferences were held with the City officials in an effort to obtain their cooperation and because of their seeming inability so to do appellee corporations considered and made provisional plans for installing their own utilities. The steam boiler house was designed to permit the production of steam sufficient to energize steam generators which appellee corporations made arrangements to obtain from the United States Army from *Attu* and *Kiska* and prior to ground-breaking the City Council was advised the appellee corporations were contemplating the furnishing of their own power to their own tenants. Appellee corporation's intentions to furnish its own power

were abandoned in August, 1949, because of the assurances of the then City Manager, Mr. Wilson, and of the Mayor and Council to cooperate in the furnishing of power to Government Hill for the use of the prospective projects (R. 339-341, 345).

Ground was broken to the project in August of 1949, and tenant occupancy commenced about two years later (R. 338-346).

Ordinance No. 55 (Defendant's Exhibit I) was repealed on August 24th, 1949, by the Council of the City of Anchorage and signed by the Mayor thereof, by Ordinance No. 283 (Plaintiff's Exhibit 10).

At that time and prior to completion of the apartment construction project, there was in full force and effect in the City of Anchorage, Alaska, a rate schedule of the electric light and power service of the City—published in the telephone book (the only form of publication of its rate schedule then or still used by the City), which provided in part as follows:

"Schedule C — Commercial Rate

"This service is applicable to single-phase service for lighting, cooking, small appliances and incidental single-phase motors not in excess of five (5) horsepower, in professional, mercantile, industrial and other establishments not classed as single family residences.

First 25 KWHrs.....10 cents
Next 50 KWHrs..... 8 cents
Next 50 KWHrs..... 7 cents
Next 1000 KWHrs..... 6 cents
Next 1000 KWHrs..... 5 cents
Excess KWHrs..... 4 cents
Minimum monthly charge per meter.....$1.00"
(R. 95)

On March 15, 1951, a project manager (Mrs. Lela Hall) was hired by appellee corporations and came to Anchorage to open the project. Among her duties was the opening up of a utilities account with the City of Anchorage, and the manager, in the preparation of her budget analysis, discussed with Mr. Robert Sharp, then City Manager, the estimated or proposed utility costs and she was at that time advised that Panoramic View Corporation would be treated as one establishment. That conversation took place to the best of her recollection early in 1951 (R. 164, 165). The manager was also advised that a bond to secure payment of the light bills would be required and initially $7,000.00 in cash was deposited with the City to guarantee payment of the monthly light bills of the two appellee corporations (R. 178, see also R. 191, 192; R. 200-203).

Mrs. Hall testified:

> "A. Well, in preparation for occupancy, there are many, many, contacts on all phases of necessary utilities. During this time, shortly after arrival, I had a conference with Mr. Robert Sharp, then City Manager. I was preparing a budget analysis and I asked for estimates, so I discussed with him the proposed utility costs and at that time I was told that *we would be treated as one establishment.* I refreshed my recollection by going back through the minutes and notes that I had referred in the minutes of the corporation, the word *'establishment'* was used." (R. 164) (Emphasis supplied)

(Mrs. Hall was not inexperienced in this line of work. Prior to assuming her position as Project Manager for appellee corporations she had been managing 1300

apartments in Seattle for the Seattle Housing Authority) (R. 206).

"Q. Actually what did you ask the City to do; combine the meter readings and give you one rate? Is that what you asked them to do?

A. We asked for combined billing, you are correct, because under the interpretation of the ordinance as it was written we believed we were entitled to a single billing because all the buildings were identical and we had been treated as one customer or had been told we were being treated as one customer." (R. 190)

* * * * * * * *

"A. We had been told that we would be treated as one establishment and one customer and we had discussed with them that same approach and the . . . " (R. 191)

* * * * * * * *

"A. I was assured by Mr. Sharp that we would be treated as one customer and I still feel that that was his commitment made." (R. 203)

Mr. Sharp was then City Manager and Mason Lazelle was Electrical Superintendent of appellant City (R. 189-190).

The first billings for electrical energy were received by appellee corporations in September of 1951. It was at once apparent that appellant City had not only abrogated the Agreement it had theretofore made with reference to combined billing but had completely disregarded its own published rate schedule (Exhibit C). Mrs. Hall testified on this matter as follows:

"A. Yes, we were in constant contact and on the first receipted billing which came through in September, we received individual billings for each building. I took these billings back down to Mr.

Pendergras, who was then the City Treasurer, and Mr. Pendergras stated Mr. Sharp was out of town. I assumed that an error had been made. I asked him for a corrected billing. . . . In the meantime I talked to Mr. Mason Lazelle. Mr. Lazelle told me I would not be permitted to have a single billing because the National Electrical Code would not permit me to have single billings where I had individual meters. Then . . . " (Ex. "J") (R. 165)

* * * * * * * *

"Q. To the best of your recollection who was present during the conversations you had with City officials?

A. Oh, goodness. I can enumerate several City officials also. Let's put it this way: Mr. Sharp, Mr. Lazelle, Mr. Pendergras, on occasions you accompanied me, Mr. Hellenthal, at times our Maintenance Supervisor accompanied me and on other occasions Mr. Arthur Cahn accompanied me.

Q. When you referred in your testimony to being billed as one establishment, what did you mean by that Mrs. Hall?

A. Well, I was in the process of preparing preliminary budgets and during the discussions I went in to get the rate schedules and discussed our whole financial picture and at that time I was told, and Mr. Cahn was with me at the time, that we would be treated as one establishment and we got the rate schedule and discussed billing at the same time because we (124) understood there was also a deposit to be made and we wanted to prepare for the deposit.

Q. Now, in connection with the deposits did you put up a bond for those deposits?

A. Yes, we initially put up $7,000.00 in cash and

then later secured a bond. It was about three months before the bond was processed and we put up a surety bond and that was put up by the management agency originally then by the two corporations later." (A. 177-178).

Subsequent conferences were held in which various reasons were given by appellant City for its failure to honor its published as well as its specific contract. These reasons were:

(1) Combined billing prohibited by Ordinance No. 55 (Repealed August, 1949, by Ordinance 283) (Ex. "I," "10").

(2) Combined billing forbidden by virtue of Electrical Code (Sec. 2301) (Exhibit J). This was shown to be inapplicable.

(3) That the City needed the additional revenue (R. 203, 206, 212, 213, 214, 216, 217) (See R. 423, 425).

Up to November 9, 1951, the date of the Council hearing at which this matter was considered, nothing had been said to Mrs. Hall by any City official with reference to any prior policy which prevented appellant City from giving effect to the published rate schedule and/or their agreement with appellee corporations. Mrs. Hall specifically testified that up to this time that she knew of no such policy (R. 235, 212, 210).

All light bills were thereafter paid under protest (Exhibits "1," "II").

The record further shows that appellee corporations operated the first establishments of their kind in Anchorage, Alaska, subsequent to the repeal of Ordinance No. 55, and no similar operation came into existence after the repeal of Ordinance No. 55 and before appel-

lee's operation commenced upon which the establishment of such a policy could be based (R. 226-230).

Evidence of any such policy or practice, can be found nowhere in this record to support appellant's statements that it had such a policy after repeal of Ordinance No. 55, and it is stipulated in the record that appellee corporations were charged in accordance with defendant's Exhibit A, based upon defendant's Exhibit C. the rate schedule and that there was no other published rate schedule or regulation other than that contained in Exhibit C and as subsequently promulgated and published as set forth in Exhibits C, D, E, F, G. (R. 85-98).

Counsel for appellant further stipulated in open court that appellee corporations would be entitled to receive the most favorable rate (R. 123).

No evidence was introduced by the appellant City to contradict the testimony of Mrs. Hall. Neither Mr. Sharp, who was then City Manager, or Mason Lazelle, who was then the City Electrical Superintendent, was called as a witness by the City, although the City had been fully aware for months of the pendency of this action. No testimony of any kind was attempted to be introduced by the appellant City to vary, modify, or change Exhibit C, the published rate schedule, which was admitted to be the only published rate schedule.

There was introduced into evidence a contract entered into by and between Civil Aeronautics Administration and the City of Anchorage dated July 19, 1951, by the terms of which the City sold power to the Civil Aeronautics Administration for .0282 cents per kilowatt hour, substantially less than any published rate and by a supplement dated 12-18-51 authorized and per-

mitted the Civil Aeronautics Authority to retail power to airport tenants at the International Airport. This contract is still in effect and evidences the authority of the then City Manager to act for the City in making of contracts for the sale of electrical energy (Exhibit "L").

A Mr. Willard Reuss, an electrical engineer, called by the City, testified in part as follows:

"Q. If you assume, as testified by Mrs. Hall, that each of these projects would be treated as one consumer and that friendly relations existed between the City and these project owners is it not true that the present arrangement of electrical connections is a simple and practicable arrangement?

A. I think it is evident by the way it has already been done, yes, it is a simple way to do the electrical arrangement.

Q. And it would be a practicable way of effectuating the intent of the parties if the intent of the parties was that the house consumption would be treated as one consumer?

A. I think under that assumption you would certainly have to go into the terms and conditions of the contract you would be entering into.

Q. Well, assuming, as I say, an agreement or contract between the parties that the project owner would be entitled to having house current treated as one consumption, is there any more economical or practical or feasible way of arranging the delivery of energy than it now is?

A. Physically no.

MR. RADER: *I think we stipulated, if it please the court, that this was the most economical and most*

practicable way to supply these premises with electrical energy. (Emphasis supplied)

THE COURT: Well, I thought there was some such stipulation, too, but I am not positive about it.

MR. RADER: I believe that there was." (367) (R. 403-404)

* * * * * * * *

By Mr. Reischling:

"Q. Mr. Reuss, do I understand your testimony correctly that the cost of serving, that is, the present additional cost of serving the halls in Panoramic View as the buildings are now wired is negligible as compared to the cost of bringing the entire output of power to the place, that is, there are 22 meters in the building for the apartment users and there is one meter that measures the power that is consumed by the halls?

A. That is true and that is also true to any customer that is added.

Q. There would not be any needed addition to the line distribution facilities themselves to serve this additional hall customer than you already have or than would have been required if the hall customer was not furnished?

A. That is correct." (R. 391-392)

* * * * * * * *

"Q. Then I will rephrase it. Then so far, Mr. Reuss, as I (358) understand your testimony the rates and regulations as published by a municipality for the furnishing by that municipality of utility service to the consumer are not binding upon the utility in any manner whatsoever?

A. I wouldn't say so.

Q. Well, how would they be binding?

A. What I mean to say is that your rates are indirectly based on policy. I mean, you can't separate one from the other. (R. 395-396)

* * * * * * * *

"Q. (By Mr. Cottis): In your experience, Mr. Reuss, have you come across any other situation similar to this in these respects: a similar published tariff, a complete lack of any control through a public service commission or public utility commission or regulatory body of that nature and a a complete lack of any ordinances, rules or regulations beyond what appears in these telephone-book published schedules? Have you come across anything like that?

A. You mean a situation exactly like this? *No.*

Q. Almost invariably there is some regulation, is there not?

A. Yes. May I qualify that statement?

Q. Certainly. (384)

A. Either by regulatory commission or by City council or local rule." (R. 430)

Mr. Robert W. Retherford, an electrical engineer, who was qualified an as expert, and who had a great deal of experience in the Anchorage area, both as system engineer, or chief engineer, of the Chugach Electric Association, testified on behalf of appellees on the basis of his familiarity with the distribution system installed on Government Hill for appellee corporations (R. 277-280).

Following are excerpts from his testimony:

"Q. What is its classification as to whether it is single phase or 3-phase?

A. Yes, I guess I should add that. I believe that the buildings themselves are served with what is known as single phase, 122 4-volt 3-wire service.

Q. What sort of load is handled by the house circuits in connection with those buildings?

A. It is my understanding, from looking at the drawings, that the house circuits serve the lighting that is supplied by the owners of the building, it serves the small motors that are used in connection with the heating system and probably serves the laundries and other appliances that might be placed there by the owner." (235) (R. 282)

* * * * * * * *

"Q. (By Mr. Cottis): Mr. Retherford, you have examined Defendant's Exhibits C, D, E, F and G which are the various electrical tariffs that have been in effect, have you not?

A. Yes, sir, I have seen them from time to time.

Q. In your opinion, Mr. Retherford, do the published tariffs, as set forth there, appear to preclude the opportunity for such establishments as this to obtain the benefits of single point service?

A. No, I see nothing or have seen nothing in any of these published rates which would preclude a commercial establishment such as this from obtaining the benefit of a single point of delivery." (236) (R. 283)

* * * * * * * *

"The third method, and in this case is probably the one that is far more practical than any of those I have mentioned so far, *is the simple method of totalizing which involves only the installation of distribution to totalize the readings of the meters that are installed as presently arranged in these*

buildings. That can be done. It can be done fairly reasonably, but there is some expense attached and there might be some question as *to whether there is a good reason for installing a totalizing meter when you simply take the readings of it, add them up and produce the same results.*" (R. 285) (Emphasis supplied)

* * * * * * * *

"The simplest way, I believe, is the way it is arranged there right now and that in considering this commercial establishment as one user of a commercial classification, which it is, and the facilities in the same identical classification as the apartment buildings you have pointed out, it is one user. It is a commercial user. It is the same class as those buildings. I see no reason why, especially if there has been a meeting of the minds prior to the beginning of the project, as has been testified to, that the client is one consumer, this consumer would not be given the benefits of single point metering." (R. 286) (Emphasis supplied)

Counsel for the appellant made the following stipulation:

"Mr. Rader: If it please the court, we have listened to Mr. Retherford's testimony and I don't agree with some of his conclusions altogether, *but certainly his factual statement as to the method of doing this and also to the fact that the cheapest and most economical method of doing it is totalizing the metering, totalizing the bill, providing you would treat them as one customer, is the most economical method, we agree with him. He is a hundred per cent correct.* We will go that far in a stipulation." (R. 288) (Emphasis supplied)

(Testimony of Robert W. Retherford)

"Q. (By Mr. Cottis): From an engineer's point

of view, Mr. Retherford, what is the difference, if any, between the commercial house current used in connection with the 1200 'L' Street Apartments and the McKinley Apartments and the plaintiffs here?

A. Well, *there is no basic difference.* The only difference is physical isolation of one unit from another and that difference, if you want to bring it down into specific items, consists primarily of the wiring involved to tie them together. In the case of your 1200 'L' and McKinley buildings, the owner provided the wiring to tie all the floors of that building together, to inter-tie all of the house electrical circuits to one point. It is my impression he could have done the same thing in Panoramic View, but he was under the impression it may not have been necessary because it was cheaper to do it the way it is done now.

Q. And there is no basic electrical difference, then, from an engineering point of view?

A. No. The only difference is this physical one I explained which involves the physical—which interconnect the circuits of the owner." (242) (R. 289)

Neither the present Electrical Superintendent or City Manager was called by the City as a witness. At the close of the testimony the matter was fully argued to the court, briefs were requested and filed and the trial court filed an opinion in favor of the plaintiffs which contained Findings of Fact on which judgment was subsequently entered.

Summarized the undisputed facts are:

(1) Repeal of Ordinance which allegedly had banned conjunctive billing except where permitted for the City's convenience.

(2) Construction of apartment project consisting of 14 two-story buildings of some 12 to 22 units each, on unsubdivided tract of land, each building requiring electric current for the tenants therein (not involved in this suit), and each building requiring current for hallways, areaways, etc., for owner, and metered separately from that furnished tenant.

(3) Publication by appellant City of rate schedule for power prior to occupancy by tenants of project, and providing for declining rate per KW on basis of volume of current used by "establishment" not classed as single family residence (Jan. 1, 1951, Exhibit C).

(4) Agreement of qualified and authorized City official prior to commencement of operation of project to treat appellee as one customer (but one bond required to guarantee payment by appellee for house power used by it rather than 14 bonds which would be the case if appellant City treated each of the 14 buildings as single "ownerships"; levy and assessment of taxes by appellant City on entire project as one taxpayer rather than as 14 individual taxpayers as would be expected if appellant treated each building as being separate entity (R. 16, admitted by answer).

(5) Installation of wiring under the direction of the City and the installation of the meters by the City, it being admitted by the City that the installation made was the most economical, feasible, and practical under the circumstances there existing.

(6) Abrogation of its published contract (Rate Schedule, Exhibit C) by the City. notwithstanding the fact that the published rate schedule has been republished each year, or oftener, without change.

(7) Payment of all light bills by appellee corporation made under continuing protest.

(8) Commencement of suit in equity for injunction to enjoin City from continuing billing practice not in accord with published rate schedule, and in violation of published contract and separate agreement to prevent discrimination against plaintiffs and to recover the difference between the rate paid under protest and the most favorable rate as published.

ARGUMENT IN SUPPORT OF JUDGMENT

After concisely reviewing what he deemed to be the material facts giving rise to the instant litigation, the trial court posed the question which he believed to have been submitted to him for determination as follows:

> "* * * but as I view the case, out of the welter of contentions only two questions emerge, (1) whether a housing project consisting of several buildings erected on one tract of land and owned by one person is an 'establishment' within the meaning of (Schedule C) of the City's rate tariffs, and (2) if so, whether the practice of the City in refusing to combine meter readings is in conflict with the schedule."

The court then pointed out that under the Anchorage code of 1949, the City Manager was empowered to make and publish rates and charges for electrical energy and service and that effective January 1, 1951, the City had promulgated the rate tariff of which tariff Schedule C was applicable to the present controversy. Schedule C, the commercial rate, was then set out in full. The court then stated:

> "Since it can hardly be disputed that the plain-

tiffs' housing projects are 'establishments' within the meaning of Schedule (C) the crucial questions are, (2) whether the refusal of the City Council to grant the request for combining meter readings is equivalent to an authorization or ratification of the practice referred to, and (2) if so whether the practice conflicts with Schedule (C) * * *. However, Schedule (C) necessarily implies than an 'establishment' is entitled to the benefits of the sliding scale of rates, whereas the construction placed upon this schedule by the City is that such an 'establishment' is entitled to this benefit only if the service is of the one point variety."

The court then rejected this contention stating:

"Since it effectually excluded any establishment consisting of more than one building from the benefits of lower rates for increased consumption, I am of the opinion that it was in conflict with Schedule (C) except where multiple meters were installed at the request of the consumer. Judgment may be presented in accordance herewith. (Emphasis supplied)

/s/ George W. Folta,
District Judge"

It is our view of the matter that no other reasonable conclusion could have been reached in this case. We believe, that the legal principles with reference to the promulgation of their rates by utilities companies have been so firmly established so as to require no extended citation of authorities. It is also a general rule that the same rules applicable to public utilities company's generally, apply to municipalities in the conduct of their utilities systems, when said system are operated by the municipality. We believe that the following is a fair

general statement of the law with reference to the publication of rate schedules.

> "A public utility is bound by, and must comply with, its published rate schedule and may not void or vary it by contract or otherwise."
>
> (Colo.) *PUR Annual 1948 Re Burrow,* I & S, Docket No. 286, Decision 31039—1948.

> "A lawfully published rate, so long as it remains uncancelled, is fixed and unalterable."
>
> *City of Highpoint v. Duke Power Company,* 34 F.Supp. 339 (1940).

> "The last rate published is the legal, suable rate, and controls."
>
> *Brown v. P.U.C.,* 31 Atl.(2d) 435 (1943).

A case reported in Public Utility Reports 1925 B at page 90, entitled *"Florence Laundry Company v. The Missoula Light and Power Company"* is almost exactly in point with the facts in this case. The Florence Laundry Company used large quantities of water and purchased its water from the defendant utility company. The laundry originally got water from one metered pipe to one building. It acquired a second building across the street which it adapted to laundry purposes and to a garage. Additional water was needed which was furnished by the utility company and an additional meter was installed. From 1920 to 1924 separate bills were given the laundry for water measured by each meter. In 1924 the laundry demanded a combination of meter readings and the rendition of one bill which would give the laundry the benefit of a lower rate based on the larger consumption. The water company refused this request. The

laundry refigured its bills and demanded a refund of the difference between what it had paid and what it contended it should have paid had the rates been properly figured. The utility refused to pay excepting upon an order of the Montana Public Service Commission. The rules and regulations of the Commission contemplate that all water used in substantially one service should be separately metered. Different meters are provided only when a service is distinct as represented by (1) manner of use or (2) when furnished to the same person or corporation for different purposes, or (3) to different ownerships on the same premises. In this instance all of the water was furnished to one corporation for one purpose or identical use at points so near to each other as to defy a distinction for and on account of distance or cost of service. In holding with the plaintiff corporation, the Commission stated:

> "There is no distinction between the two services or between the purposes of the two meters, save the accidental circumstances of installation at a short distance apart. Clearly, the meter reading should have been combined and but on bill rendered for the combined consumption * * * a common roof, sheltering different persons and different businesses will not justify combined meter readings; that the same person owning the same kind of properties at different locations, may not for that reason have meter readings combined and that the same person owning different businesses at different locations may not for that reason have meter readings combined. In other words *there must be identity in the person of the customer, unity in the physical locations and similarity in the uses. All of these conditions occur here and operate to justify*

the consolidation of meter readings and the rendition of the bill on the consolidated statement.'' (Emphasis supplied)

An order consistent with the opinion sustaining plaintiff's prayer for overcharges was entered.

Are not the criteria the same here. There can be no question as to the identity of Panoramic View and its fourteen buildings. The unity of the physical location is established—an unsubdivided tract of seventeen acres leased to the plaintiff by the United States of America, covered by one mortgage; no question has been raised nor has it been suggested that the use to which plaintiff puts the power in each of its fourteen buildings is not identical so that we have similarity of use. Under the circumstances we believe that appellee is entitled as a matter of right to the rate to which it is entitled as a large user of electricity.

In the case of *Esmerelda Power Co. v. Nevada,* PUR 1920 E 788, a California case, it was held that a company is entitled to include the meter readings at different locations as one service so as to be entitled to lower rates for greater consumption where the different plants are operated as component parts of one business, but not otherwise.

It was held in the case of *Colonial Gardens Corporation v. Philadelphia Suburban Water Company* (1947) 71 PUR NS 497, that:

''An apartment development of 186 apartments in a group of eleven buildings on a single plot of ground is such a business establishment as to qualify it under the word 'commercial' appearing in a

> water company's single line commercial provisions and, therefore, is entitled to single point water service as a single customer unit."

Notwithstanding the decision against it by the Public Utilities Commission of Philadelphia the water company appealed and in 1949 the Appellate Court of Pennsylvania affirmed the decision of the utility commission as reported in 64 Atl.(2d) 500. In its opinion the court pointed out that the buildings were erected on a single plot of ground owned by Colonial, and the buildings were constructed of various sizes in order to avoid uniformity. The mortgage under which the project was financed covered the entire plot and all eleven buildings (as in the instant case). The project was taxed as a single unit by the local real estate taxing bodies. Testimony in the case was to the effect that the only difference between this project and the conventional apartment building was that the units were grouped in buildings rather than being in a single structure, and that one of the reasons for this grouping was to provide light, air, lawns and the incidental conveniences offered to persons having easy access from their units to the outdoors. The court held that the development was a commercial establishment and as a consumer was a single owner corporation and was, accordingly, entitled to be billed as a single customer.

The case of *Bilton Machine Tool Co. v. United Illuminating Co.,* 148 Atl. 337, 67 A.L.R. 814 (a Conn. case), is strong supporting authority for plaintiff's position here. In entering judgment in favor of the plaintiff for the amount of overcharges paid by it to the defendant

electric company for power furnished, the Supreme Court of the State of Connecticut said:

> "Basing the charge or rate by a sliding scale upon the quantity used is an accepted principle of public administration as applied to public utility corporations, and this form of classification has been upheld by the courts where neither the classification nor the rates nor charges were unreasonable."
>
> "(The plaintiff's complaint) is that the defendant billed to it two bills for separate charges for power used in each of its two departments which it paid with the result that the amount of these bills greatly exceeded the amount which would have been due had the amount of power used in plaintiff's plant been combined and the charges made for the amount used under each of the gradations of this single sliding scale of rates. . . .
>
> "This was manifestly unreasonably discriminatory and hence illegal . . . it knew that the plaintiff was entitled to have all of the power used by it charged upon one ledger account and one bill furnished for this and it knew that if it continued two accounts on its ledger and billed each account to the plaintiff it would be receiving from the plaintiff more than it was enttiled to charge and more than it charged to the corporations similarly situated."

To the same effect:

> *Oklahoma Gas and Electric Co. v. Shipley,* 87 S.W.(2d) 635;
>
> *Scovill Mfg. Co. v. Kilduff,* 64 Atl. 218 (Conn. case).

We respectfully submit that the judgment entered in accordance with the filed opinion in the instant case,

and the injunction granted herein, is fully supported by the record and by the law. We further submit that as the record stands it is the only judgment and decree that could have been entered.

Pending determination of this matter on appeal, appellant City has continued the same billing practices as were complained of prior to and during the trial of the instant case, and accordingly, the amount of plaintiff's recovery cannot be ascertained without arithmetical computation to determine the full amount of appellee corporation's overpayment from the date complained of in the complaint herein.

ARGUMENT IN ANSWER TO APPELLANT

Counsel lists eleven points in his "Statement of Points" upon which he relies in this court.

I. Points 2, 3, 4, 5, 6 and 9 challenge the sufficiency and weight of the evidence, and of the law, on which to predicate a judgment in favor of appellee corporations.

II. Point 1 is a contention that he was deprived of trial by jury.

III. Points 8, 10 and 11 challenge the sufficiency of the filed written opinion with respect to the adequacy of the Findings of Fact and Conclusions of Law therein contained upon which the judgment was entered.

Counsel then summarizes his arguments at page 17 of his brief which we believe may be fairly paraphrased as follows:

1. The refusal of the City to compute and bill appellee corporation for the total kilowatt hours used by ap-

pellee corporation as house power in its buildings at the published declining rate is permitted under an established practice which the trial court found to be reasonable.

2. The published rate schedule, not expressly providing for combined billing, must be deemed to have forbidden combined billing.
3. The court cannot fix rates different than the schedule adopted by the municipality, and the trial court here did not find that the schedule of rates published were unreasonable or discriminatory.
4. The Memorandum Opinion did not fix the measure of damages or recovery.
5. Appellant was denied its right to trial by jury.

The Trial Court Did Not Find That Appellant City Had Adopted Any "Practice" as Asserted by Appellant Counsel or That Such Asserted "Practice" Was Reasonable (Argument in Answer to Appellant)

It is at once obvious upon reading the Memorandum Opinion of Judge Folta that his reference therein to appellant City's "policy" is not a finding that any such policy existed. The court merely referred to a summarization of part of what transpired at the council meeting on November 9th, 1951, as was produced by appellant City and offered in evidence as Exhibit K, the appellant's stated reason for denying appellee's request for combined billing. The portion quoted by the court was lifted from Exhibit K and was put into the opinion for the purpose of permitting the court to make a finding or to at least draw the inference that it was obvious from this quoted portion of the record of the occurrences at that council meeting that the City officials

were fully cognizant of the fact that Ordinance No. 55 had been repealed, and were therefore attempting to base their rejection of plaintiff's request for combined billing on a statement of "policy" (R. 47, 48). The court then concluded that the City, in his opinion, would not be required to make such a practice—if it was a practice —the subject of a rule or regulation. The court found that an "establishment" would be entitled to the benefits of the sliding scale of rates and further found that it could not be disputed that appellee corporation's projects were establishments within the meaning of the published rate schedule (Exhibit C). The court then stated that if the City had made a classification which prevented a customer from obtaining the benefit of the declining rate to those situations where the power was furnished from but one service point such a classification *"could hardly be said to be unreasonable"* if it did not conflict with the published rate schedule. The court held, however, that such an interpretation conflicted with the published Schedule C and that it, accordingly, would not avail the appellant as a defense. We submit that counsel's entire argument on this phase of the case is based upon an inaccurate and misleading interpretation of the court's opinion.

Counsel has heretofore admitted that appellee corporations were billed in accordance with Schedule C (Exhibit C) as modified by Exhibits D, E, F, and G, as those rate schedules were promulgated, published and went into effect and that appellee corporation, Panoramic View, was billed as though it were 14 independent customers on the basis of its operation of 14 buildings (even though it is one establishment), and

that it was not given the benefit of the declining rate on the basis of the total consumption of power in those 14 buildings which it would have been entitled to under the published schedule if the City is bound by the published schedule (R. 82-87). It is difficult, therefore, to understand how appellant can now argue that appellee corporation has not been required to pay in excess of the published rates and why it is not therefore entitled to repayment from the City. Neither the fact that the City desires to retain the money which it obtained from appellee corporations through coercion, nor the undesirability to the City of totalizing the meter readings and the application thereto of the published declining rate are proper or persuasive matters of defense.

Counsel has cited in his brief a number of cases which he contends support his position. We have read those cases. We now assert, without equivocation, that the cases hereinafter referred to and cited by counsel as authority are not in point and do not support his position. Matter quoted out of context is never reliable, as for example: Counsel quotes at length from *Realty Supevision Company v. Edison Electric Illuminating Co. of Brooklyn* PUR 1917 B, Page 962, as authority for his position in the instant case. In that case the facts were that a "conjunctional service rider" published in the utility company's rate schedules permitted conjunctive billing to one owner or one lessee of two buildings which were not more than 100 feet apart. The plaintiff owner rented space to various tenants who were engaged in independent businesses. The owner sought to compel the utility to pool all of the electrical charges for all of the electricity used by the

various tenants and to bill him (as owner of the buildings) for the total, thus permitting the tenants to have a wholesale rate instead of the rate in effect when the tenants were billed separately. Prior to the hearing the utility filed a new schedule and the "conjunctional service rider" was omitted therefrom. The company contended that the original rider had not been intended for the purposes sought by the building owner. The Commission merely held that such a rider was not intended to permit disassociated persons or firms to band together in order to get a lower rate.

The case of *Land Title Bank & Trust Company v. Pennsylvania Public Utility Commission.* 10 Atl.(2d) 343, is not in point. That case involved the attempt of the owner of an apartment project to have all of the power used by all of the tenants billed to him on the declining rate. In rejecting the contention that the owner of the apartment project was entitled to have all of the power used by his tenants billed to him as one customer the court cited from the case of *Hunter v. Public Service Commission* (Penn.) 168 Atl. 541, stating:

> "The real point at issue is whether the customer is a single commercial industrial consumer receiving water for the purpose of one business unit or whether the 34 tenants are each essentially separate and are commercial customers."

In the instant case no contention is made similar to that made by petitioners in the last two cases cited and the cases are not therefore in point.

The case of *Raceland v. Colvin,* 95 S.W.(2d) 1113 (Kentucky 1936) was one in which a dwelling, feed-

barn, garage, plus a four-room apartment and bath above the garage, all on one lot, were attempted by the owner to be combined as one customer and the owner given the benefit of a declining rate. In that case *an Ordinance of the City specified that but one building would be served by one meter.* There was also diversity of use, diversity of customers, as well as separate buildings. That case, therefore, is not in point (Emphasis supplied).

United States v. American Water Works, 37 Fed. 747, involved the efforts of Fort Omaha which had had a special contract with the City of Omaha for water service, to compel the City after it had annexed the land area embracing the Fort, to furnish to it water under ordinances at a lesser and combined rate. The Fort contained dwelling houses, barracks, hospitals, warehouses, etc. In that case the court held that the Fort was not entitled to combined billing, saying that the question was not who owned the buildings but what *was the character of the buildings, the number of them, and the use to which they were put. In that case also the rate schedules contained distinctions based upon use.* That case is obviously not in point (Emphasis supplied).

The case of *Carpenter v. Pennsylvania Public Utility Commission,* 15 Atl.(2d) 473, merely held that the commission's findings with reference to the fixing of rates, etc., could not be disturbed if they were made on competent evidence and there is not in the instant case any question as to the right of the municipality to make rates, nor any question as to the reasonablenss of the rates made.

It will be noted that in his argument, notwithstanding his summaries of the arguments, the argument itself is not germane to the subject matter which it is supposed to contain. Nothing is set out in pages 17 to 33 of his brief which tends to establish any practice or policy contrary to that declared in the published rate schedule (Exhibit C, D, E, F, G).

Accordingly, we submit that the trial court did not have before it any evidence from which it could have made any Finding of Fact that the appellant City had any practice or policy other than that contained in published rate schedule.

The Published Rate Schedules, as Worded, Authorize Combined Billing (Argument in Answer to Appellant)

The testimony of Mr. Retherford (*infra*) which is unrebutted discloses that the service furnished to appellee corporation was single phase, 122 volt, 3-wire service, furnishing the power for the hall lighting that is supplied by the owners of the building, the small motors that are used in connection with the heating system and other small appliances. Schedule C, the commercial rate, specifically provides for "single phase service for lighting, small appliances and incidental single phase motors" in "professional, mercantile, industrial and other establishments not classed as single family residences," and then set forth the declining rate schedule based upon consumption. The court found that appellee corporation was an establishment as defined by this published schedule. Mr. Retherford further testified that in his opinion *there was nothing in the published rates which would preclude a commercial establishment*

such as appellee from obtaining the benefits of meter totalization and the application thereto of the declining rate based upon volume (Emphasis supplied). No testimony was introduced to rebut this.

Counsel has fixed the climate in which he argues that to give to appellee corporations that which they are entitled under the published rate schedule could have "disastrous consequences" because of (a) decrease in revenue to the City. This argument is very difficult to follow because all appellee corporations ask is that they be charged in accordance with the published rate schedule and in accordance with the agreement which was made with appellee corporations by the City's representatives at the time of the commencement of occupation of these projects. Appellees do not seek to obtain any different or lesser charge than that enjoyed by its competitors. As was testified to by Mr. Retherford (R. 289), there is no difference between the service of house current to the apartment houses known as 1200 "L" Street and the McKinley Apartments in Anchorage than that of appellees excepting that because all of the units in the first two mentioned apartment projects are located in one structure all of the house current is metered for all of the hallways, etc., by one meter. Appellee corporations believe that they should not be penalized by a different application of the published rate schedule to them than is given to their competitors merely because through circumstances beyond their control, and although their operation is identical with those of the first two named apartment projects, there is a physical separation of the owner's premises into 14 separate buildings. As is shown by the record, all of the

tenants in each of the 14 buildings must have service to each of the 14 buildings and the cost of installing the additional meter to measure the house current used is and was negligible. The number of lines and the kind and character of service would not be affected in any manner by removing the house meter from each of the meter boards and it is obvious that the time that it takes a meter reader to glance at one additional meter and note the amount of current which has been measured by that meter is also negligible. Appellant City says in effect:

> "Regardless of the published rate schedule and regardless of the fact that this is one operation with one ownership on one tract of land with identical use by the owner, of the electric current furnished in each of the 14 buildings for the convenience of his tenants, by giving them hallway and areaway lights, etc., and regardless of the fact that for tax purposes we treat them as one entire establishment and for power purposes with respect to their furnishing security for the payment of their light bills we also treat them as one customer requiring but one bond to cover all of the 14 buildings, nevertheless we take the position that with regard to the application of the rates they are 14 separate customers because we want the additional revenue that we can derive by that device, and it would be disastrous to us to make us give them back their money."

Appellant City fails to point out that prior to the developments herein, which were built on Government Hill (and including Hollywood Vista) which was then a wasteland and produced no revenue, that the City now collects annually in taxes from appellee corpora-

tion's properties a sum approximating $140,000.00 per year together with revenue from light users, some 982 in number, approximating $165,000.00 per year plus additional revenue from the sale of water and monthly garbage disposal fees.

The fact that a man may not want to give back that which he has illegally taken from another should be no defense when the injured party seeks redress.

Counsel has cited from pages 33 to 36 of his brief additional cases which are not germane to the heading nor to the argument and which are not in point as follows:

Re Great Falls Gas Co., Docket No. 3434, PUR (NS) 1946, Vol. 65, was a case in which the Public Service Commission held that the totaling of gas metered to all public institutions and to the school district and giving to the City a lower rate on the basis of the increased consumption constituted a rebate to the City. In that case the Commission cited *Florence Laundry Co.* (*supra*) in which it was held that a common roof—sheltering different businesses—would not justify combined billing. The court stated that to be entitled to combined billing there must be (1) *identity of the person,* (2) *unity in the locations,* (3) *similarity of uses. This is exactly the situation that prevails in the instant case* (emphasis supplied).

The *Pacific Gas and Electric Company* case cited in 17 PUR (NS) 1937, page 13, merely passed upon the reasonableness of rates of utilities under published schedules, the applicant contending that the rate applied to it was discriminatory because of lowered cost

of production by the utility and because other classifications of users had different and lower rates. The case is not in point with any issue involved in the instant litigation. The matter quoted in counsel's brief is out of context and not in accord with the facts herewith presented.

The Trial Court Did Not Make a New Rate Structure for Appellant City's Municipal Utility (Argument in Answer to Appellant)

We respectfully submit that in this case nowhere can there be found any evidence relating to the making or fixing of rates other than that contained in Ordinance No. 608.1 which empowered the City Manager to make and publish rates and charges for electrical energy and service, and that section is set forth in the opinion of the trial court (R. 46). We further submit that all the trial court did was to apply the published and promulgated rate schedule to the facts as were disclosed by the evidence.

Neither the argument contained in appellant's brief from pages 36 to 44, inclusive, nor the cases cited therein are either germane to this issue or in point with the issue here presented.

Whether or not a court has the power to judicially intervene or invade the rate-making functions of properly constituted authorities set up for the purpose of making rates is not a question in this case. Accordingly, we are impelled to refuse to joust at appellant's windmill.

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Return of Excess Charges Paid Under Protest Was Recognized "Measure of Damages" (Argument in Answer to Appellant)

In his summary of arguments (IV) counsel now contends that the Memorandum Opinion was defective because it did not "find or state the measure of damages or recovery, if any, to which appellees are * * * entitled." The record at pages 89 through 94 discloses the fact that prior to the commencement of taking testimony it was agreed by counsel for appellant City that if appellees were entitled to recover they would be entitled to the difference between the amounts which they had paid under protest and the amount which they would have been required to pay had the proper rate been applied in the proper manner to the operations of appellee corporations. Nothing more is involved other than arithmetical computations which must await final determination of this action.

The Memorandum Opinion Contained Sufficient "Findings" (Argument in Answer to Appellant)

The trial of the above-entitled cause was commenced on March 24, 1955, before the Honorable George Folta, District Judge, and continued through March 29th, 1955. Subsequently, briefs were filed by both parties and on May 25th, the court filed its Memorandum written opinion in favor of plaintiffs concluding with the words, "judgment may be presented in accordance herewith." Shortly after filing his Memorandum Opinion the trial court died. Motion for new trial was made by appellant and filed on June 30, 1955, in which mo-

tion in addition to the other matters and things herein discussed appellant challenged the sufficiency of the Memorandum Opinion on which to enter a decree. The motion for new trial was denied by the Honorable J. L. McCarrey, Jr. (the successor to Judge Folta), District Judge, on August 31, 1955 (R. 64).

Prior thereto appellant had filed objections to the entry of judgment on the Memorandum Opinion upon the same grounds which were argued at length before the Monorable J. L. McCarrey, Jr., District Judge, which objections were overruled, and judgment and decree entered on June 21st, 1955 (R. 58).

> "It has been held that for some purposes, a judgment may be regarded as existing as soon as it is pronounced, particularly where nothing remains to be done except to record the entry of the Judgment, and a number of cases have held that the decision of a court constitutes its Judgment. The signing of an Opinion may, for certain purposes, be regarded as a pronouncement of Judgment in open court.
>
> *Dohany v. Rogers,* 281 U.S. 362, 68 A.L.R. 434, 50 S.C. 299.
>
> "Further, it has been held that as between the parties themselves the entry or recording of a Judgment is not essential, although to be effective as against third persons, recording of a Judgment may be essential." 30 Am. Jur., page 824, 825.
>
> "Further, it has been held that it is not essential that any artificial or technical phraseology or any prescribed form of expression be employed by a court in the rendition of a Judgment to make the same valid and effective. It is merely necessary

that the Judgment appear to be the act of adjudication of the court.

Bell v. Otts, 13 So. 43 (Ala.).

"It would also appear that no form of words and no peculiar formal act is necessary to evince the rendition of a Judgment."

United States v. Hark, 320, U.S. 531, 64 S.C., 359. Rehearing denied, 321 U.S. 802, 64 S.C., 517.

See 52 A. Federal Rules of Civil Procedure as cited in *Grip Nut Co. v. Sharp,* 150 F.(2d) 192, where it was held that the trial court has the primary function of choosing from among conflicting factual inference and conclusions those which it considers most reasonable and the requirement of the Rule (52 A.) that a district court makes Findings of Fact and state Conclusions of Law must only be reasonably complied with. *Smith v. Dental Products,* 168 F.(2d) 516.

The Federal rules of civil procedure have been adopted by and are followed in the Territory of Alaska by the courts thereof.

Rule 63 of the Federal Rules of Civil Procedure reads as follows:

"Rule 63. Disability of Judge.—If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court, under these rules, after a verdict is returned or Findings of Fact and Conclusions of Law are filed, then any other judge regularly sitting in or assigned to the court in which the action is tried, may perform

those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion, grant a new trial."

In the notes of the advisory committee on Rules, it is stated that this Rule adopts and extends the Provisions of USCA, Title 28, former Sec. 776 (Bill of Exemptions; Authentication; Signing of By Judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

Under the statutes of the Territory of Alaska, it has been provided that a successor judge may sign a Bill of Exceptions in the event of the death of his predecessor. It would therefore appear that by statute itself the Territory followed Sec. 776 of Title 28, USCA, and by adopting the Federal Rules of Civil Procedure, the Territorial District Court has full power and authority to enter a formal judgment as was herein entered.

A case almost directly in point is the case of *Makah Indian Tribe v. Moore* (D.C. Wn.) 1950, 93 Fed. Supp. 105, reversed on other grounds, 192 Fed.(2d) 224. In that case it was held that where the judge who tried the case announced his decision against the plaintiffs and for the defendant *in an extended oral Opinion which contained a statement of the essential ultimate facts in dispute and applicable rules of law, and the Opinion was transcribed by a reporter, copies were given to counsel, and one copy was placed in the clerk's file, but the judge died before normal Findings of Fact or Conclusions of Law, or Judgment were submitted to him,*

the judge who was thereafter assigned to sit and hold court in that district, had the power to sign the formal Judgment in accordance with the announced decision of the decedent judge.

It is obvious from an examination of the filed opinion that Judge Folta did not intend to enter Findings of Fact and Conclusions of Law other than those contained in the Memorandum Opinion, as he stated that: "Judgment may be presented in accordance herewith."

In a case somewhat analogous to the situation thus presented is that of *Patton v. Baltimore & Ohio Ry. Co.,* D.C. (Penn.) 1954, 120 Fed. Supp. 659. In that case, the court held that where the evidence in the trial, after a remand, was substantially the same as the evidence in the first trial, and the trial judge had denied a motion for a new trial sought because of asserted errors in rulings upon evidence, and the Court of Appeals had approved the rulings on appeal from the Judgment in the first trial, a motion for a new trial, sought on the ground that the judge assigned to the case after the death of the trial judge would be unable to perform the duties to be performed in passing on the motion for the new trial would be denied.

We submit that on the basis of the City's own published rate schedule, no court could find that the published rate schedule did not warrant the giving to Panoramic View Corporation the advantage of the declining rate, as an establishment for quantity use. The record speaks for itself and is conclusive on this point.

In the case of *Lashbrook v. Kennedy Motor Lines,* D.C. (Penn.) 1954, 119 Fed. Supp. 716, on a motion for

a new trial or Judgment *n.o.v.* for plaintiff in an automobile collision, brought on for hearing after the death of the judge who presided at the trial, it was held that the record was sufficiently clear and complete to warrant the other judge's disposing of the motion without hearing the case *de novo*.

We submit that there is before this court a complete record, including a filed, comprehensive written opinion of the trial court, containing sufficient Findings of Fact and Conclusions of Law and that to grant a new trial would be to subject both parties to this controversy to additional needless expense. We further submit that on the basis of the law and on the basis of the record with respect to the publication of Schedule C, there can be no change in the conclusion which inevitably must be reached on the basis of that evidence, and while it may be that the City feels itself hurt as the result of the decision by Judge Folta, its hurt is due to its own irresponsible act in refusing to follow its own published schedule and its refusal to accord to this plaintiff the benefit of the declining rate for increased consumption as provided for in that schedule. Had the City followed its own schedule, this case would never have been brought, and in good conscience, any argument advanced by the City, no matter how adroitly worded, should not be permitted to confuse the issue and to becloud the right of the plaintiff to recover its own money which the City has collected without legal right, and used for its own purposes. This is not a suit for damages. This is a suit to recover back the money owned by Panoramic View Corporation and illegally extracted and collected from it.

The Appellant Was Not Entitled to Trial by Jury (Argument in Answer to Appellant)

Shortly after court convened for the purpose of trying this action the following occurred:

"MR. RADER: If it please the Court, it is an action which is primarily an action in which it is alleged discrimination, discriminatory rates and discriminatory application. Several items of fact have to be decided and I would assume that we had a right to a jury trial on it.

THE COURT: Just because there are questions of fact, that isn't what gives you the right of a jury trial. It is the nature of the action. What have you to say about that?

MR. RADER: The action is pursuant to Territorial Statute. I can't state whether it is an action for loss of damages—it is an application for a refund of—

THE COURT: It asks for injunctive relief. Unless you contend that is merely camouflage it would appear to be an equitable action.

MR. RADER: I don't know about camouflage, but I think they probably did want injunctive relief all right. As to the future I assume that the injunctive relief would apply, but as to the past it is the question of discrimination. I think that it is a matter of reasonableness of rates and rate classifications.

THE COURT: *I am inclined to think it is a non-jury case.* Well, you may proceed with your proposals then." (R. 80-81) (Emphasis supplied)

Rule 39 of the Federal Rules of Civil Procedure, provides as follows:

"Rule 39, Trial by Jury or by Court.

"(A) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be

designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless * * * (2) *the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.*" (Emphasis supplied)

Under the above-quoted Rule, it was held that:

"Where principle demand of Bill of Complaint was for injunction and alternative demand was for damages, the plaintiff was not entitled of right to a jury trial on the issues for injunction, but such was discretionary with the trial court."

Miss. Pac. Transportation Co. v. George (Ark. 1940) 114 F.(2d) 757.

"In considering whether action is equitable or legal for purpose of determining whether it is triable by judge or jury, the court may consider the nature of the plaintiff's prayer for relief."

St. Farm Mut. Auto Ins. Co. v. Mossey (C.A. Ind. 1952) 195 F.(2d) 56, certiorari denied 73 S.Ct. 109.

"Form of complaint and nature of relief prayed for must guide the trial court in its determination as to whether the trial shall be to a court or by jury."

Canister Co. v. Leahy, 191 F.(2d) 255.

"The right to jury trial is determined by whether the issues as disclosed in the complaint are essentially legal or equitable in nature."

Russell v. Laurel Music Corp. (D.C., N.Y., 1952) 104 F.Supp. 815.

In the recent case of *Howard v. U. S.,* 214 F.(2d) 759,

it was held that in an action by the United States to require a landlord to make restitution of overcharges the landlord was not entitled to a jury as the action was an equitable one.

CONCLUSION

Appellee, Panoramic View Corporation, hereby respectfully submits that the Judgment of the Trial Court was correct and that it should be affirmed.

Respectfully submitted,

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